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SUPREME COURT, U.S.
FILED
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MICHAEL RODAK, JR.

In the

Supreme Court of the United States

JANUARY TERM, 1973

No.

THE CITY OF NEW HAVEN,
Petitioners,

v.

THE TOWN OF EAST HAVEN, ET ALS.,
Respondents.

RESPONDENTS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RESPONDENTS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE OF THE RESPONDENTS, THE TOWN OF EAST HAVEN, ET ALS, TO PETITION OF THE CITY OF NEW HAVEN.

The Respondents respectfully urge that the petition be denied for the following reasons:

1. It does not present a substantial federal question;

2. It is basically an attempt to re-try numerous issues of fact already passed upon by the District Court and the Court of Appeals.

Further, the Respondents do not agree with the "Statement of the Case" submitted by the Petitioner in that it recites a series of conclusions, allegations and errors, representing the Petitioners interpretation of evidence and actual errors of fact.

The Respondents set forth below their own "Statement of the Case" and rebuttal of the six arguments made by the Petitioner.

STATEMENT OF THE CASE

This was an appeal by the defendant City of New Haven from an award of damages for inverse condemnation made to the Respondents, six owners of property located in the area adjacent to the Tweed-New Haven Airport.

A brief background history of the airport will serve to enhance one's comprehension of the decision appealed from, the claims of law and the factual allegations.

Originally operated in 1931 as a turf airport catering to the few private planes then owned and operated in the area, the airport began to take on its present configuration in 1941 when two paved runways were constructed. The "prevailing wind" runway runs north and south and is identified as Runway 2-20. Crossing Runway 2-20 and running northwest to southeast is Runway 14-32. Runway 14-32 was constructed 4,100 feet long and has not been extended. Runway 2-20 has become the main runway and is used by all of the larger commercial planes. It was extended from 4,200 feet to 4,771 feet in 1951. Its further expansion in 1967 by 829 feet to its present length of 5,600 feet prefaced certain litigation between the Town of East Haven and residents of East Haven

and New Haven on the one hand and the City of New Haven and the airlines on the other.

Use of the airport has roughly followed the overall pattern of air travel development, attracting more flights and bigger planes as both commercial and general aviation activity increased.

The first commercial airline at Tweed-New Haven commenced operations in 1934, terminated in 1937, resumed in 1941 and terminated again in 1942. American Airlines returned to New Haven in 1946 and departed in 1960. Smaller private planes have always used the airport.

With the advent of turbo-prop and jet aircraft, the operation and use made of the airport took on a different character.

In 1965, Allegheny Airlines commenced the use of turbo-prop planes, a variety of which is currently in use. At the time of trial, Allegheny's operations consisted of ten flights per day.

Eastern Airlines has operated at New Haven since 1950. However, in 1967 it replaced its propeller driven craft with turbo-props and pure jets — DC-9s and Boeing 727s. The use of the jets was discontinued after only two months, and in 1969, all Eastern operations ceased. In June, 1970, Eastern resumed its jet operations and at the time of trial, it was making four jet flights per day at Tweed-New Haven.

As is clearly indicated in the opinion of the trial judge (*Town of East Haven* v. *Eastern Airlines, Inc.*, 331 F. Supp. 16, 19-21) the airport has grown steadily and its use and traffic have increased drastically. The character of the planes using it changed from propeller craft to turbo-props and jets.

Even the so-called "small" planes comprising the category of "general aviation" were frequently jet powered.

Of the individual parties awarded damages, Michael Fusco's property is directly north of Runway 2-20 and every plane landing from north to south, or taking off from south to north, passes over his property or some portion of it. His property lies in part in East Haven and in part in New Haven.

Leslie Munro owns properties at 110 and 114 Morgan Avenue, East Haven, Michael Criscuolo owns 72 Morgan Avenue and Alphonse Guidone, Jr. is the owner of 6 Canna Drive, East Haven. These properties are to the south and slightly west of Runway 2-20. Planes landing from the south and taking off from the north pass over Munro's properties. Incoming planes pass over the Criscuolo property but only the Eastern planes appear to fly any pattern, with the others approaching his property in assorted routes. The Guidone property is also subjected to direct overflights, but since it is some blocks closer to the airport, the planes pass much lower over it.

The Audette property is also at the southern end of Runway 2-20, just slightly to the east of a line extending from its southern terminus. It was from this property that motion pictures were taken and some of the sound tests were recorded.

While the Amendola property is located at the southeasterly end of Runway 14-32 which is not generally used by the larger commercial planes, he is subjected to frequent direct overflights. He also had the experience of a private corporate plane crashing in his front yard.

This suit sought damages for trespass and nuisance as well as a "taking" in violation of the Fifth and Fourteenth Amendments. The Respondents further sought injunctive relief and

compensation for fear, annoyance, inconvenience and interference with their peace and quiet.

It should be noted that even while this case was pending, changes effected at the airport had a direct bearing on the plaintiffs' allegations as to the negligent and unsafe operations of the airport. For example, the control tower was not installed until December 1969 and the "VASI", a landing aid, was not installed until June 1970. A portion of the complaint was specifically directed at the airport's lack of these and other safety and efficiency devices.

This suit was originally brought against the Administrator of the Federal Aviation Agency, Eastern Airlines and Allegheny Airlines. In the course of preliminary hearings, Judge Timbers indicated that the City of New Haven was a necessary party and the Petitioner was subsequently added as a party defendant. The Administrator's Motion to Dismiss was granted by Judge Timbers in an opinion which was somewhat critical of the failure of the FAA to consider the complaints of the Respondents. Consequently, the action proceeded and went to trial with the two airlines and the City of New Haven as defendants.

ARGUMENT

I.

THE DOCTRINE OF GRIGGS AND CAUSBY SHOULD BE UPHELD AND AN AIRPORT OPERATOR SHOULD REMAIN LIABLE FOR THE ACTIVITIES IT SETS IN MOTION.

The City's argument that it should be exculpated from liability for the taking of the avigation easement because it was the airlines and the United States Government who were the

actual "takers" is in direct conflict with the rule established in *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). At page 89 of its opinion, the Court in that case stated:

> "It is argued that though there was a 'taking', someone other than respondent was the taker — the airlines or the C.A.A. acting as an authorized representative of the United States. We think, however, that respondent, which was the promoter, owner, and lessor of the airport, was in these circumstances the one who took the air easement in the constitutional sense. Respondent decided, subject to the approval of the C.A.A., where the airport would be built, what runways it would need, their direction and length, and what land and avigation easements would be needed. The Federal Government takes nothing; it is the local authority which decides to build an airport vel non and where it is to be located. We see no difference between its responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built. Nor did the Congress when it designed the legislation for a National Airport Plan."

The argument that the City cannot close the airport even if it wanted to comes too late for relevancy. Its inability now to close the airport comes from its initial election to construct it and to make use of federal funds. Thus, it is its contractual obligations only, arising from the use of such funds, and its election to participate in the National Airport Plan, that now prevent it from abandoning the Airport.

Nothing in the Federal Airport Act or the National Airport Plan requires any local community to proceed to construct an airport in the National Airport Plan. See 14 Code of Federal Regulations:

"Section 151.3 National Airport Plan.

(a) Under the Federal Airport Act, the FAA prepares each year a 'National Airport Plan' for developing public airports in the United States, Puerto Rico, the Virgin Islands, and Guam. In terms of general location and type of development that is necessary to provide a system of public airports adequate to anticipate and meet the needs of civil aeronautics.

(b) . . . Only work on an airport included in the current Plan is eligible for inclusion in the Federal-aid Airport Program to be undertaken within currently available appropriations and authorizations. However, the inclusion of an airport in the National Airport Plan does not commit the United States to include it in the Federal-aid Airport Program. In addition, *the local community concerned is not required to proceed with planning or development of an airport included in the National Airport Plan.* (Italics ours)"

Other than its announced preference for passing its legal responsibility on to someone else, the Petitioner has advanced no legal (or logical) basis justifying a departure from established law.

II.

The Trial Court, Following The Causby Doctrine, Found There Were Overflights And That There Was A Taking.

The City's contention that the Respondents failed to satisfy the "overflight" requirements which constitute a "taking" as defined by the doctrine first proclaimed in *United States* v. *Causby*, 328 U.S. 256 (1946) is unequivocally refuted by the

facts and by the analysis of the *Causby* doctrine set out in the trial Judge's opinion (331 F. Supp. 16, 30-33, inclusive).

That the trial Judge recognized and followed the requirement of "overflights" is obvious from his opinion. At page 32 he stated:

> "Not only must flights be over the land, they must be frequent and low. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."

His adherence to the requirement of "overflights" is further demonstrated by his statement that the great majority of cases concerned with application of *Causby* have held that although annoyance and damage caused by activities on an adjacent airfield may be real, they do not constitute a "taking" and by the following quotation from his opinion:

> "Although there is thus no decision directly binding on me as to how *Causby* should be interpreted, I feel that only cogent reasons should induce me to depart from the great weight of federal authority in other circuits. I have not found a sufficiently compelling reason to do so." (at p.32).

In adhering to the requirement of "overflights" and applying the same to the facts proven in the present case, the trial Judge found that some of the plaintiffs in the suit had failed to satisfy the requirement. As to them, he stated:

> "As to some of the plaintiffs, the task is not difficult. Clearly, there was no taking of the properties of Corona, Proto or Salvatore Criscuolo. Their complaints are directed essentially to the disturbance created by taxiing planes and planes idling on the runway and at the terminal. This sort of damage comes directly within several

of the decisions previously cited. It is consequential damage which does not rise to the Fourteenth Amendment level." (*Op.* p. 32)

In the next paragraph of his opinion, the Court found that two of the other plaintiffs had failed to prove that the overflights were frequent. As to Messrs. Camarota and Canali, the Court found:

> "Camarota's properties on Morgan Terrace are not in the direct flight path of the incoming and outgoing planes. As far as the evidence shows, it was on only a very few occasions that a plane went near or over his property. This is not often enough to satisfy the requirement of frequency. The noise and soot from the planes that passed by within earshot but not over his property did not constitute enough of a direct and immediate interference or constitute a taking within the *Causby* rule." (At p. 32).

And as to the Canali property, the Court found:

> "Private planes occasionally fly over his house and commercial airlines have done so on 'several occasions' in the past four or five years, only in bad weather. This is not frequent enough. On all the evidence, I conclude that the evidence . . . does not meet the *Causby* test." (At p. 33)

As to the other plaintiffs, those awarded damages, the Court found:

> "Although the question is close, I conclude, on all the evidence, that there was a sufficiently direct and immediate interference with these plaintiffs' use and enjoyment of their land to constitute a taking." (At p. 33)

The evidence supports the trial court's conclusions and his award of damages.

All of the plaintiff-appellees testified that they and their properties are subjected to direct overflights and to resultant annoyances and damage. For example, when asked whether the planes pass over his house, Mr. Amendola testified that he could actually "see the rivets when they fly over our house." Trial Tr. p. 288 (See also Trial Tr. p. 289) When Mrs. Audette was asked on redirect examination whether there were times when the planes pass directly overhead, she responded that there were. On direct examination she testified several times that the planes go directly over her property. (App. pp. 34a, 37a, 41a) The fact is undisputed that the trial court accepted the testimony that her house was in a direct line with the north-south runway. Trial Tr. p. 419 (App. p. 37a) Proof of overflights (App. p. 37a) can be shown for all the plaintiff-appellees. They all testified that their properties were subjected to direct overflights: Mr. Criscuolo's testimony concerning overflights is contained on Trial Tr. pp. 113, 114, 116, 120, 122; Mr. Fusco's is on Trial Tr. pp. 419, 421, 422 (App. pp. 26a, 28a); Mr. Guidone's testimony to overflights can be read on Trial Tr. pp. 378, 379, 394 (App. pp. 31a, 32a, 33a); and Mr. Munro's testimony to overflights can be read on Trial Tr. pp. 191, 193, 197. (App. pp. 19a, 20a, 23a)

The plaintiff-appellees also testified of interference with the use and enjoyment of their properties as a result of these overflights. Most testified that conversations had to stop when the planes flew overhead. Some testified that their homes and properties were subjected to oil spots, soot and fumes. Mr. Munro testified that the damage was so frequent he was replacing his glass windows with plexiglass whenever one was broken and that he has already had over $200. worth of broken windows. (App. p. 20a) Mr. Guidone testified that the

sheet rock between the walls and the ceiling was constantly cracking.

This repetition of the credible evidence on the basis of which the court reached its conclusions serves no purpose as it is all in the transcript. Mr. Amendola's testimony can be found on Trial Tr. pp. 289, 290; Mrs. Audette's is on Trial Tr. pp. 418, 419, 420; Mr. M. Criscuolo testified to interferences on Trial Tr. pp. 113, 114, 116, 117, 119; Mr. Fusco's testimony to the interference is seen on Trial Tr. pp. 262, 266, 269; Mr. Guidone's testimony can be found on Trial Tr. pp. 380, 382, 383, 384, 386, 388; and Mr. Munro's testimony concerning interference can be found on Trial Tr. pp. 193, 195, 196, 197.

It is apparent that the Court had ample evidence to support its conclusion that each of the Respondents had suffered substantial interference with the use and enjoyment of her or his property, and that such interference was the direct result of overflights, or flights "so very close to these properties . . ., as to make it seem like unrealistic nitpicking to deprive these plaintiffs of the benefit of the *Causby* rule."

The defendant City also contends that *Causby* requires "substantial diminution". (Def. Brief p. 11) That this is not true is noted twice in the opinion. The first time, on page 262, when the Court stated:

> "There is no material difference between the supposed case and the present one, except that here enjoyment and use of the land was not completely destroyed. ***But that does not seem to us to be controlling.*** (Italics ours)

Again, on page 266, the Court stated:

> "As stated in *United States* v. *Cress*, 243 U.S. 316, 328, '. . . it is the character of the invasion, not the amount of

damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking'."

Counsel for the Respondents has been unable to find any case to support the Petitioner's argument that one's property must be destroyed before a taking can be found.

Being unable to carry on conversation, being aroused from sleep, having one's house shaken, having windows shattered, being unable to hang clothes out to dry and having one's house swimming pool coated with soot would appear to be justifiable items of complaint.

By arguing with facts already found, counsel for the Petitioner is seeking to re-try the case. Hence, Respondents have not reprinted the numerous pages of testimony already found of evidential significance by two courts. However, excerpts from such testimony are included in the Respondents' Appendix.

III.

Federal Jurisdiction Was Properly Invoked By The Plaintiff-Appellees And The Federal Jurisdictional Requirements Were Met.

The Petitioner has made a wholesale attack on the jurisdiction of the federal courts to entertain the present action, which attack was rejected in the District Court by both Judge Timbers and Judge McLean.: Both Judges held that the jurisdictional requirements of 28 U.S.C. Sec. 1331(a) had been met.

In the first instance, the City makes the claim that even if the facts in the case present a federal question, the federal

courts should stay their hand until the State Courts have acted on the State constitutional question raised by Paragraph 33 of the Plaintiff-Appellees Amended Complaint, wherein they alleged:

> "In addition, the defendant, acting under color of state laws, grants, and licenses, have deprived the plaintiffs of their rights and privileges guaranteed by the laws and constitution of the State of Connecticut, in violation of the Fifth and Fourteenth Amendment to the Constitution of the United States."

The City's position is that a determination must first be made by the State Courts on the allegation that the State Constitution had been violated before the federal courts can adjudicate the federal issues. As support for this contention, the City places great reliance on *Barney* v. *City of New York*, 193 U.S. 430 (1904). District Court Judge Timbers, in denying the City's claim, summarized the City's position and correctly enunciated the present state of the law as follows:

> "The City of New Haven, however, claims that this Court lacks jurisdiction because, if the plaintiffs' property has been taken, such a taking is also a violation of Connecticut's constitution and laws, and plaintiffs must, therefore, first seek redress in a state court. This very contention was rejected by the Supreme Court in *Mosher* v. *City of Phoenix, supra*. The plaintiff in that case sought to restrain the City of Phoenix, Arizona, from appropriating her land for purposes of a street improvement project. She alleged in her complaint filed with the District Court for the District of Arizona that the city was 'attempting to take and appropriate the property of plaintiff without compensation, and to take and appropriate and use same and deprive the said plaintiff of the permanent use thereof without due process of law, or any process of law, . . . and in violation of the rights of plain-

tiff as guaranteed her under the Constitution of the United States, and particularly under amendments five and fourteen thereof, which plaintiff here and now pleads and relies on for her protection against the wrongs and threatened wrongs of the defendant City in the proposed taking of her property as hereinbefore described.' *Id.* at 31. But because the plaintiff also alleged that the city's action violated state law, the Court of Appeals for the Ninth Circuit affirmed dismissal of the complaint by the District Court for lack of a substantial federal question, noting that the city's action did in fact appear to violate state law. *Mosher* v. *City of Phoenix*, 54 F.2d 777 (9th Cir. 1931) The Supreme Court, however, held that the dismissal was improper: 'We are of the opinion that the allegations of the bill of complaint that the City acting under color of state authority was violating the asserted private right secured by the Federal Constitution, presented a substantial federal question and that it was error of the District Court to refuse jurisdiction. 287 U.S. at 32.' This case is controlling here." (App. pp. 7a, 8a)

Further, Judge Timbers went on to cite *United States* v. *Raines*, 362 U.S. 17 (1960) as authority for the fact that although *Barney* has never been directly reversed or overruled, it is of not continuing authority. He specifically referred to pages 25 and 26 of the *Raines* opinion which contains the Supreme Court's discussion of *Barney*:

"The appellees can draw no support from the expressions in *Barney* v. *City of New York* . . . The authority of those expressions has been 'so restricted by our later decisions', see *Snowden* v. *Hughs*, (321 U.S. 1, 13 (1943), that *Barney* must be regarded as having been worn away by the erosion of time, *Tigner* v. *Texas*, 310 U.S. 141, 147, and of contrary authority. See *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 37; *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U.S. 278, 283-289; *Iowa-Des*

> *Moines Nat. Bank* v. *Bennett*, 284 U.S. 239, 247; *Snowden* v. *Hughs, supra; Screws* v. *United States*, 325 U.S. 91, 107-113, 116. *Cf. United States* v. *Classic*, 313 U.S. 299, 326. It was said of *Barney's* Doctrine in *Home Tel. & Tel. Co.* v. *Los Angeles, supra* at 284, by Justice White: '(its) enforcement . . . would . . . render impossible the performance of the duty with which the Federal Courts are charged under the Constitution'." (App. pp. 8a-9a)

Support for Judge Timbers' holding is also found in C. Wright, Federal Courts 185 (2d ed. 1970) in which Prof. Wright says of *Barney*:

> "A case . . . had seemed to hold that an action unauthorized by state law could not be state action for purposes of the Fourteenth Amendment. This decision has no continuing authority. It was settled . . . that action by a state officer claiming to act under authority of the state can be enjoined, even if the state has not authorized such action." (citing *Home Tel & Tel. Co.* v. *City of Los Angeles, supra* and *United States* v. *Raines, supra*)

Notwithstanding the correct application by the District Court Judges of the principles affirmed by the U.S. Supreme Court in *Raines*, the City maintains that the federal court should abstain from granting a forum to the plaintiff-appellees because remedies were available to them in the state court. This argument of the City's was correctly refuted by Judge Timbers who referred to the case of *Martin* v. *Creasy*, 360 U.S. 219 (1954) in which the three abstention doctrines were reviewed and then stated "but unlike *Martin*, the circumstances which would merit abstention are not present in the instant action." (App. p. 9a)

Even stronger language rejecting the defendant City's contention is found in the case of *Lave* v. *Wilson*, 307 U.S. 268, 274 (1939) in which the U.S. Supreme Court said:

> "Barring only exceptional circumstances or explicit statutory requirements resort to a federal court may be had without exhausting the judicial remedies of state courts."

The Eighth Circuit Court's position on this contention is stated in *Dove* v. *Parham*, 282 F.2d 256, 262 (8th Cir. 1960):

> "Judicial remedies of state courts for indication of federal constitutional rights do not have to be exhausted, before there can be resort to a federal court, unless some federal statute so requires as to a particular legal situation."

Similarly, in *Amsley* v. *West Virginia Racing Commission*, 378 F.2d 815, 817 (4th Cir.) *cert. denied* 397 U.S. 974 (1970), the Fourth Circuit Court stated:

> ". . . it is well settled that resort to a federal court may be had without first exhausting the judicial remedies of state courts."

The City's next attack on the Court's jurisdiction is based on the contention that none of the plaintiff-appellees had a chance to approach damages over $10,000. This statement is patently incorrect as is evidenced by the supplemental Answers to Interrogatories sworn to on October 2, 1970. Both District Court Judges to whom this jurisdictional issue was addressed, after listening to all parties and examining all the pleadings concluded that the plaintiff-appellees had succeeded in their burden of proving that an amount-in-controversy in excess of the required amount was present.

The Petitioner contends the action should have been dismissed for want of jurisdiction because the plaintiff-appellees failed to prove their claims that they were damaged in excess of the required amount. *Saint Paul Mercury Indemnity Co.* v. *Red Car Company*, 303 U.S. 283 (1937) provides the legal

basis for the complete rejection of that contention. In that case the United States Supreme Court stated that "the inability of plaintiff to recover an amount adequate to give the Court jurisdiction does not . . . oust the jurisdiction." *Id.* at 289. It is now well settled law "that jurisdiction is not lost because the award is for less than the jurisdictional amount." C. Wright, Federal Courts 111 (2d ed. 1970).

It is conceded that courts do have the authority to dismiss for want of jurisdiction when it appears to a *legal certainty* that the plaintiff cannot recover the amount which he had demanded. *Saint Paul Mercury Co.* v. *Red Cab Company, supra.* Such legal certainty, however, does not arise merely from the impressions obtained from the evidence adduced that the claimant may not be entitled to recover as much in damages as he requests in his ad damnum. Even if a Judge receives impressions, on the trial or the hearing of a cause, that it appeared to a *moral certainty* that the issue did not substantially involve a dispute or controversy within the jurisdiction of that Court, he would not be justified in dismissing for want of jurisdiction. *Barry* v. *Edmunds,* 116 U.S. 550 (1886). The requirement that it appears to a legal certainty that no recovery can be had for an amount equal to or in excess of the jurisdictional minimum is the generally accepted and sound principle of law.

The Third Circuit Court applied that principle in *Wade* v. *Rogala,* 270 F.2d 280, 284 (3rd Cir. 1959) when it stated that:

> "unless the court were convinced that the plaintiff was never entitled to the jurisdictional amount, and his claim was therefore asserted only for the purpose of gaining jurisdiction dismissal on jurisdictional grounds would not be justified."

In 1964, the Third Circuit Court again applied the principle of *Gullborg* v. *Rizzo*, 331 F.2d 557, 561 (3rd Cir. 1964) when it said:

> "The test is applied in limine: only when it appears with legal certainty that the claim cannot possibly reach the requisite level will the action be dismissed . . ."

The Fifth Circuit Court's acceptance and adherence to this principle is evidenced by *Anderson* v. *Moorer*, 372 F.2d 747, 750 (5th Cir. 1967) where the Court stated:

> "The plaintiff has alleged that more than $10,000. is in issue, and such allegation, if in good faith, is sufficient unless it appears to a legal certainty that recovery cannot exceed the jurisdictional amount."

The Fifth Circuit Court again applied the principle in *Jones* v. *Landry*, 387 F.2d 102 (5th Cir. 1967).

Even more pertinently, this Court applied the principle in *Deutsch* v. *Hewes St. Realty Corp.*, 359 F.2d 96, 101 (2d Cir. 1966) when it said:

> "Though it may seem unlikely that plaintiff will be able to substantiate that she should recover damages in excess of $10,000, on this record it is not clear to a legal certainty that she cannot do so: we ought not affirmatively decide more than that."

The *Deutsch* case further made it clear that in determining whether or not the requisite amount was present, the Court should not decide the merits of the case.

This latter concept was expressed by the United States Supreme Court in *Smithers* v. *Smith*, 204 U.S. 632 (1907) when it noted that the authority to dismiss is not unlimited and that "its limits ought to be ascertained and observed, lest, under the guise of determining jurisdiction, the merits of the con-

troversy between the parties be summarily decided without the ordinary incidents of trial." *Id.* at 632.

Similar language was employed in *Continental Casualty Company* v. *Department of Highways, State of Louisiana*, 379 F.2d 673, 675 (5th Cir. 1967) where the Fifth Circuit Court stated:

> ". . . When the issue of jurisdictional amount is intertwined with the merits of the case, courts should be careful not to decide the merits, under the guise of determining jurisdiction, without the ordinary incidents of trial."

The Third Circuit Court expressed this principle when in *Jaconski* v. *Avison Corporation*, 359 F.2d 931, 935 (3rd Cir. 1966) when it stated:

> "Except in the plainest cases the issue of jurisdictional amount should not be decided if the ruling constitutes at the same time a decision on the merits."

The principle was expressed in slightly different language by the Fifth Circuit Court in *Fireman's Fund Insurance Company* v. *Railway Express Agency*, 253 F.2d 780, 784 (6th Cir. 1958) when it said, citing *Land* v. *Dollar*, 330 U.S. 731, 735 (1947):

> "Where the jurisdictional issue as to amount in controversy cannot be decided without the ruling constituting at the same time a ruling on the merits of the case, the case should be heard and determined on its merits through regular trial procedure."

Again, in *Wade* v. *Rogala*, *supra* at 285, the Third Circuit Court stated:

> "The necessary choice, except in the flagrant case, where the jurisdictional issue cannot be decided without

> the ruling constituting at the same time a ruling on the merits, is to permit the cause to proceed to trial."

Thus, it is clear that for Judge McLean to have dismissed the plaintiff-appellees' cause of action, he would have been required to find that it appeared to a legal certainty that the plaintiff-appellees would be unable to recover in excess of the amount-in-controversy requirement, and his decision would have had to have been made without ruling on the merits of the case. That no such legal certainty appeared to Judge McLean is apparent on page 32 of the transcript of the pre-trial hearing held on October 6, 1970, when he stated:

> "As I said before I have not ruled and I am not ruling now on whether emotional disturbance, fear, mental anguish or whatever you want to call it is the proper element of damages in these cases or not but it does seem to me that the plaintiffs should be permitted to claim it and let me take the testimony on it and let me make my decision on the basis of the record rather than doing it in a vacuum."

Accordingly, the plaintiff-appellees contend that federal court jurisdiction was properly invoked and that the District Court Judge did not err in rejecting the City's challenge.

IV.

The Damages Sustained By The Plaintiff-Appellees Have Been Proven By Substantial Evidence And With Reasonable Certainty.

The defendant's attack on the expert testimony of the two real estate appraisers disregards the elementary principle that it is the trier who determines the weight to be given to the

evidence, evaluates the opinions of the expert witness and makes a choice between conflicting opinions.

A reading of the defendant-City's argument on the question of proof of damages would have one believe that the trial court had no basis whatsoever for its findings. The argument blithely ignores the factual conclusions reached by the Court on two occasions as well as the court's specific rejection of the testimony offered by the City's expert — that the plaintiffs had not been damaged at all by the airport activities. (331 F. Supp. 16, 34 and Suppl. Op. App. pp. 2a, 3a)

The court, having heard the plaintiffs, having viewed pertinent motion pictures (Op. p. 25) and having listened to actual tape recordings of airport operations (Op. p. 25) had substantial evidence before it to conclude that damages had been sustained. That conclusion being amply supported by the evidence, it was then only necessary to determine by competent testimony the actual amount of such damages.

It is respectfully submitted that an examination of the evidence before Judge McLean at the supplemental hearing compels the conclusion that his decision was based on both fact and law.

Qualifications Of The Experts:

Each appraisal prepared by Messrs. Heberger and Nitz (Ex. 2-9) contained a detailed statement of their educational and professional qualifications. Mr. Heberger testified he had qualified as an expert witness in Maine, Vermont, New York and Connecticut and taught appraising at the University of Connecticut. (P. App. p. 9a) Mr. Nitz, in addition to his profes-

sional qualifications, testified to having been involved in airport property acquisitions for the runway extension in 1966 and 1967. (App. pp. 11a, 12a)

Scope Of The Study:

Mr. Heberger stated that in arriving at his opinions, he had considered all three recognized approaches for the determination of value and that two of them (cost and market data) were ultimately utilized to arrive at the before and after values of the subject properties. (P. App. p. 12a) He then explained in detail the application of the factor formula which was carefully and thoroughly set forth in the individual appraisals. (Ex. 2-9) The court was also given the benefit of a demonstration and explanation using a theoretical example. (P. App. pp. 13a-20a)

Both experts testified to having previous knowledge of the geographical area in question and to having spent considerable time on the scene, examining properties, etc. (P. App. 30a-32a) A complete study of all real estate transactions in the area in question was made and analyzed with real estate in East Haven and surrounding towns. (App. p. 13a, 14a)

With respect to the formula factor, Mr. Heberger related he had read of this method of damage appraisal in articles authored by the developers of the method, (P. App. pp. 13a, 37a) and had discussed it with one of these men. (P. App. p. 37a) In preparing for the use of this formula factor, he had read an additional 30 articles in conjunction with the articles authored by the originators of the method. (P. App. p. 63a, 64a) Finally, it is clear from the testimony that the formula was not blindly applied but was adjusted to take into account

local factors and the particular circumstances relating to each of the subject properties. That the formula, as used, was adjusted to local conditions, is manifest by the court's express reference to that fact in its Supplementary Opinion (App. p. 3a):

> "Hall (the developer of the formula) ascribed different weights to these factors, giving the greatest weight to the first, the height of the passing planes. Plaintiffs' experts agreed with this weighing in general, but varied somewhat the weight which Hall ascribed to the second and third factors in order to make the formula, in their opinion, more appropriate for this particular airport." (Data in parentheses ours)

An examination of the appraisals (Ex. 2-9) will clearly indicate the basis for the formula, the persuasive reasons for its use in measuring damages under the circumstances existing in this case and its relevance to the particular properties involved.

Confirming Opinions:

The court, having rejected the defendant City's expert's opinion of "no damage", gave credence to the confirming opinions of the plaintiffs' experts. Each of them testified that it was his considered professional opinion that the values evolved by use of the formula were consistent with and confirmed by his own expert opinion as to the damages. (App. p. 14a; P. App. pp. 21a, 22a)

Counsel for the defendant City cites *United States* v. *Merz*, 306 F.2d 39 (1962) as authority for its claim that the use of a formula for the purpose of determining value is inadmissible. (Defendant's Brief, p. 20) It is submitted that that case

merely held that whether the use of a formula was then relevant or irrelevant was immaterial as it was not considered in determining the awards. The opinion expressly stated:

> "It may be conceded, arguendo, that the formula utilized by Willcox in appraising the damage to the several tracts resulted in arbitrary damage assessments which were irrelevant in determining fair market value after the taking. *Cf. United States* v. *Commodities Trading Corp., supra*; *United States* v. *Toronto, Hamilton & Buffalo Navigation Co., supra*; *United States* v. *Cors, supra.* It is apparent from its conclusion that the proper measure of damages was the difference between fair market value prior to the taking and fair market value after the taking, that the commission did not consider the formula testimony in arriving at its awards."

The cases in our courts each year are legion in which various methods of appraisal are employed by expert witnesses to arrive at their opinions of value, damages, etc. Capitalization of earnings is one example of use of a specific formula. One need only examine a typical condemnation case to see real estate appraisers utilizing various methods and formulas to arrive at their opinions of market values. The factors which comprise the method or formula for evaluation are all the result of the application of factual data, opinion and judgment by the expert. The ultimate test is the credence to be given to the expert's opinion. The method or means by which the expert arrived at his opinion is the criterion for determining the weight to be given to his testimony.

As indicated above, in the instant case the plaintiffs' experts did not blindly apply a mathematical formula to reach their conclusions. Being dissatisfied with what they felt was a lack of data after the taking to warrant the use of comparable

sales as a pertinent means of appraising values, they resorted to another method. The method they used took into account the particular area, the problems complained of, pertinent market and cost data, the real estate history of the area, and the experts' own actual experience and knowledge. The subject formula was only used after adjusting it to the particular facts and circumstances peculiar to the local properties involved and the local airport.

As Judge McLean stated in his Supplemental Opinion:

> "We are dealing here with expert opinion. No opinion is necessarily conclusive. Use of this formula in an airport case, in the absence of any other pertinent data, seems to me to afford a reasonable basis for the experts' opinion. Since I have been given no further pertinent data here, I have decided to apply the formula which, incidentally, produces a result substantially lower than the opinion expressed by plaintiffs' expert at the trial, which I declined to accept. Under all the circumstances, I would not feel justified in rejecting plaintiffs' evidence in its entirety, as defendant suggests." (App. p. 4a)

The defendant would have you believe that the plaintiffs' experts used some general, non-specific, collection of unsupported bits and pieces of odds and ends. An examination of the plaintiffs' Exhibits 2-9 demonstrates beyond a doubt that those appraisals represent a most precise document prepared by the diligent application of pertinent facts, skill and care. Each parcel received the same treatment and had the same formula applied to it in the same way. This is in startling contrast to some of the known methods of appraisal which have factors conducive to diverse opinions. It is axiomatic that an appraiser can influence the final result in the computation of the value of property via the income approach method by his determination of such variables as:

1. Estimated vacancy allowance;
2. Rate at which a mortgage might be obtained;
3. Administrative costs;
4. Contingencies.

Frequently, the capitalization rate is computed differently by appraisers using the same basic data, but applying their own separate judgments to those areas where discretion is permitted.

"The "Ellwood Tables", published by the American Institute of Real Estate Appraisers, and used by appraisers in determining mortgage-equity capitalization, is another example of a use of formulas in the court room.

The plaintiffs have sought to standardize a difficult process and to take the guess work out of a controversial process. They should not be penalized because their approach is novel. The overall validity and general reliability of the formula, when adjusted to local conditions, is probably best demonstrated by examining the change in dollar amounts reflected by Mr. Heberger's recomputation to allow for a three per cent glide slope and a touch down point 200 feet further northward. (P. App. p. 62a) Very nominal changes in the dollar amounts resulted, indicating a stable measure reflecting substantial influences but not sensitive to minor deviations.

This valid, equitable and precise yardstick should not be discarded by a court system which is constantly striving to achieve precision and exactitude, but frequently is helpless to do so.

Although counsel for the Petitioner has represented to the Court on Page 19 of his brief that he has printed in its entirety, in his Appendix, the Respondents' testimony, the testimony of Mr. Nitz has been omitted. The Respondents have therefore included the same in their Appendix.

V.

The District Court's Judgment Is In Accord With The Applicable Fundamental Rule Of Law Concerning Certainty And Cannot Be Impugned.

The defendant City contends that the District Court's judgment is uncertain, but when this contention is examined in perspective, it is obvious that the main thrust of the argument is not with the uncertainty of the judgment but with the claimed uncertainty of the easement granted by the Court. The City's argument raises two issues: (1) Is the judgment uncertain and void because of vagueness? (2) Is the easement itself definitive enough to be valid? The plaintiff-appellees contend that the obvious answers to both issues sustain the propriety of the judgment; that the judgment itself is positive and certain and the avigation easement is a valid one.

First, the plaintiff-appellees agree that fundamental legal principles require that a judgment "should be complete and certain in itself, and that the form of the judgment should be such as to indicate with reasonable clearness the decision which the court has rendered, so that the parties may be able to ascertain the extent to which their rights and obligations are fixed," so that the judgment may be enforced in the manner provided by law. 46 Am. Jur. 2d Judgments, Section 67

(1969). However, when this basic rule is applied to the District Court's judgment, it is apparent that the judgment is in accord with it.

Together with other precise holdings, such as the dismissal of the action against the airlines and the dismissal of the claims of the Town of East Haven, the judgment contains a finding that as to six of the individual plaintiffs the defendant City's operation of Tweed-New Haven Airport substantially interferred with such plaintiffs' use and enjoyment of their property and caused damage to the value of the said properties. The judgment also determined that these plaintiffs were each damaged in certain monetary amounts and that on payment of those amounts, the defendant City would be granted an avigation easement. With such an easement, the City would be able to operate its airport as it had at the commencement of the suit, without any further legal interference by the plaintiffs. Accordingly, it is apparent that the rights and liabilities of the parties are clearly defined by the judgment and can be enforced by law. A restatement of such rights and liabilities shows that the defendant City is granted an easement which allows it to operate its airport in the same manner and to the same extent as the airport was operated at the time of trial. Further, the plaintiffs are required to refrain from taking any action, legal or otherwise, which would interfere with the City's exercise of its avigation easement, so long as that easement is properly adhered to. All of the prerequisites of a valid judgment are thus present in the District Court's judgment. All of the interests that were to be affected by this decision were adequately represented, unlike the case of *Watts* v. *Waddle*, 6 Pet. 389 (1832) in which the U.S. Supreme Court determined that the only way all of the interests to be affected by

the decision could be adequately represented was if the court presumed that the husbands of the parties were dead and that their rights had become vested in their wives. Further, it cannot be persuasively claimed that the District Court's judgment is only understandable by a person who possesses specialized skills or knowledge in a particular field, as was the claim in the case of *Saline Branch Drainage Dist.* v. *Urbana-Campaign Sanitary Dist.*, 395 Ill. 26, 59 N.E.2d 251 (1946). Nor can it be logically contended that the judgment did not sufficiently designate in whose favor and against whom the verdict was rendered, as occurred in the cases of *Ferrell* v. *Simmons*, 63 W. Va. 45, 59 S.E. 752 (1907) and *Shriver* v. *Superior Court*, 48 Cal. App. 576, 192 P. 124 (1920).

The trial court's judgment was certain, and any and all challenges to its validity must fail.

The defendant City claims that the easement to which it would be entitled upon payment of the damages awarded to the individual party plaintiffs "is not defined as to length, width, height or actual use". It appears, however, that the defendant City is confusing the requirements of what plaintiff-appellees call a land easement with the requirements of an avigation easement. Where it might be considered necessary to describe a land easement with some degree of definitiveness concerning its width, length, height or actual use, such precision cannot be required when dealing with an avigation easement, particularly when the types and sizes of the pertinent properties involved are known. Unlike the properties involved in some airport cases, the properties involved in the present case are relatively small. It would be an impossible task to attempt to confine the overflight of the airplanes to one portion of a piece of property, for when one portion of any of these

properties is affected, the whole property suffers from the same effects. Thus, the only possible construction concerning the width or length of the easements granted here, when viewed with regard to the sizes of these properties, is that the easements encompass the full length and width of each of the parcels of property involved.

Similarly, the supposed ambiguity as to the use of the easement is quickly disposed of by noting that all parties involved are aware that the easements were granted to facilitate the landing and taking off of airplanes from Tweed-New Haven Airport. Therefore, the contention that width and length dimensions are required for these avigation easements and that the actual use for which the easements were granted is unclear cannot be allowed to impeach the validity of the easements.

It is conceded that in some cases dealing with the granting of avigation easements, a minimum height is established below which airplanes are not allowed to fly and that in this case the District Court did not establish any minimum height. However, the plaintiff-appellees contend that to do so under the conditions here prevailing would have been impossible and that the absence of such minimum height does not affect the validity of the easement.

As the trial court noted on page 33 of its opinion, the testimony of some of the plaintiffs tended to be imprecise. Most of them referred to the overflights with relation to their houses rather than to the parcels of land on which the houses stand. Though these parcels of land are each quite small, the percentage of such land occupied by the houses themselves is even smaller. From this characterization of the testimony, the

difficulties which faced the trial judge became readily evident. He was dealing with plaintiffs who had no special skills in judging heights of airplanes. The measurements they presented ranged from a low of 45 feet (Op. p. 24) to a high of 500 feet (Op. p. 22). The trial court did note, however, that the paths of incoming and outgoing planes are now controlled by the FAA control tower, and that although the path of the flights may vary slightly, "each landing should be like all others". (Op. p. 29) Thus in view of the imprecision of the plaintiffs' testimonies, if the trial court was required to determine minimum heights below which the planes would not be permitted to fly, such determination would necessarily be arbitrary. It appears that the Court decided that such a minimum height requirement was not necessary because the paths of the planes are now controlled by the FAA personnel and the essential purpose of the easement is to permit landings and takeoffs at Tweed-New Haven Airport.

A valid easement is created when the parties clearly indicate that it is their intention to grant such easement, and the land which is to be subject to the easement is clearly identified.

Saulsberry v. *Saulsberry*, 121 F.2d 318, 323 (6th Cir. 1941);

Miller v. *Snedeker*, 257 Minn. 204, 215, 101 N.W.2d 213, 222 (1960);

Sorrell v. *Tennessee Gas Transmission Company*, 314 S.W.2d 193, (Ky. 1958)

Even though the dimensions of the easement are not described, that fact or omission does not invalidate the creation of the easement.

Marin County Hospital District v. *Cicurel*, 154 Cal. A.2d 294, 299, 316, P.2d, 32, 38 (1957).

Nor can it be contended that some key word or words must be employed before an easement can be created, for as the Court in the case of *Camp Clearwater, Inc.* v. *Plock*, 52 N.J. Super. 583, 596, 146 A.2d 527, 535 (1958) quoting from 28 C.J.S. *Easements* Section 24 (1941) said:

> "No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement . . . are sufficient to effect that purpose, provided the language is certain and definite in terms."
>
> See also 25 Am. Jur. 2d Easements and Licenses, Section 20 (1968).

It appears that the New York courts having adopted the above rule concerning so-called land easements, have extended it further by allowing an easement to be considered valid even though the precise land which is to be subjected to the easement is not definitively described. The appellate division, in the case of *Rosenberg* v. *People*, 12 Misc.2d 710, 172 N.Y.S.2d 845 (1958), was confronted with a challenge to the validity of an easement which was created by the following lower court judgment:

> "Judgment will be granted to the plaintiff determining that he held a good and sufficient title to the premises in question, subject to the covenant to grant to the State an aerial easement, together with an easement to construct piers or necessary columns for supporting the overhead structure of the New England Thruway." 12 Misc.2d at 712, 172 N.Y.S.2d at 848.

In examining the language of the judgment, it is readily apparent that the precise land subject to the easement for the columns was not described even remotely, yet the Appellate Division summarily dismissed the challenge by stating:

> "The appeal is from a judgment . . . directing the conveyance of easements therein to appellant . . . In our opinion, the judgment clearly defines the rights of the parties; it needs no clarification."
>
> *Rosenberg* v. *People*, 7 App. Div. 2d 929, 183 N.Y.S.2d 422, 423 (2d Dept. 1959).

Motion for leave to appeal the Appellate Division's decision was denied by the New York Court of Appeals, 6 N.Y.2d 706 (1959).

Thus it seems that the rule in New York today permits an easement to be considered valid if the whole property is described even though only a portion of that property will be affected directly by the easement. The plaintiff-appellees are not proposing, however, that this Court adopt the New York rule because it is unnecessary to go that far in this case. The District Court judgment conforms to the established rule as earlier noted. That judgment clearly indicates that it was the intention of the court to grant avigation easements to the defendant City which will subject the individual party plaintiffs' properties to direct overflight at a height deemed necessary by the FAA regulations as applied by the FAA personnel in the airport control tower. In its most basic form that rule can be stated as being:

> "In order to grant an easement it is necessary to describe both the land to be subjected to a use and the use to which the land is to be subjected." *City of Glendora* v. *Faus*, 146 Cal. A.2d 106, 307 P.2d 976 (1957).

The City further presses its argument that the easement is uncertain by stating that once the easement is granted the City should be given deeds which can be recorded on the land records showing that the City has taken such easements.

It claims that the District Court's judgment left too much undecided to allow such deeds to be given.

It is true that some cases have required the owner of the fee to issue to the holder of the easement a deed showing that such an easement exists. Those decisions have most notably come from the Court of Claims. However, it also appears that it is within the court's discretion whether or not it orders such a deed to be issued, for the Court of Claims in still other cases has not required the owner of the fee to issue such deeds. To support the discretionary nature of such deed requirement, the plaintiff-appellees call this Court's attention to the air avigation cases of:

Aaron v. *United States*, 311 F.2d 798 (Ct. Cl. 1963);

Hyland Park, Inc. v. *United States*, 161 F. Supp. 597 (Ct. Cl. 1958).

However, even if this Court concedes to the City's contention that it should be given a deed, there is nothing to prevent the issuance of a deed, with the easement described therein either in the language of the District Judge when he said, at Page 34 of his opinion:

> "The easement . . . is a permanent easement for the operation of a similar number of turbo prop planes and jet planes of the size presently used, *i.e.* DC-9s and Boeing 727s,"

or in the following language: "a permanent easement is granted to the City of New Haven for the operation of ten turbo prop flights per day and four DC-9 and Boeing 727 flights per day at a height necessary to insure a safe taking off or landing." Either one of the two descriptions should be considered definite enough to satisfy all of the defendant's misgivings. Fi-

nally, the defendant can record the judgment itself in the proper land records.

The plaintiff-appellees contend that the actions of the parties both prior and subsequent to the issuance of a deed or easement can be used to clear up any ambiguities of which either party complains. "In construing an instrument conveying an easement the rules applicable to the construction of deeds generally apply."

> *McManus* v. *Sequoyah Land Associates*, 240 Cal. A.2d 348, 353, 49 Cal. Rptr. 592, 595 (1966).

The California court then proceeded to state that ". . . the acts of the parties under and pursuant to an instrument afford one of the most reliable means of arriving at their intentions." This position was also followed by the Court in *Belcher* v. *Elliott*, 312 F.2d 245, 248 (6th Cir. 1963) when it stated: "The conduct of the parties, after the execution of the deed, may be considered as an aid to its practical interpretation." In another case in which an alleged right of way was challenged because it was not properly described, the Court said:

> ". . . if a right of way is entered upon and used, the way becomes definite and fixed even though it may have been indefinite in its description."
>
> *Isenberg* v. *Woitchek*, 144 Colo. 394, 356 P.2d 904 (1960).

And finally the Court in the *Snedeker* case stated, while quoting from 28 C.J.S. *Easements*, Section 806:

> "Where a way is granted without fixing its location, but there is a way already located at the time of the grant, such way will be held to be the location of the way granted unless a contrary intention appears." 257 Minn. at 222, 101 N.W.2d at 222.

The plaintiff-appellees contend, therefore, the manner and extent to which the defendant operated its airport prior to the time when the Court actually granted the easement, firmly fixes such easement and no claim of ambiguity can be heard to attack its definiteness. The easement was granted to permit the airport to continue its operations in the same manner as it was being operated at the time of the suit. If the City wants to find out exactly what the Court's intention was in granting the easement, all it has to do is check the airport's operation.

The City finally contends that an avigation easement "applies to all airplanes, not just a few." However, easements similar to the type granted by the District Court which restrict the use of the easement to specific types of planes are not uncommon. The Court of Claims in the case of *A. J. Hodges Industries, Inc.* v. *United States*, 355 F.2d 592, 594 (Ct. Cl. 1966) authorized:

> ". . . The defendant to utilize the easement for the operation of B-52 jet bombers and other aircraft causing similar or less interference with the use and enjoyment of the subjacent property."
>
> See *Avery* v. *United States*, 330 F.2d 640 (Ct. Cl. 1964).

Such limited authorization reflects another principle of law which holds that even though an avigation easement has already been granted, if, through the introduction of larger, heavier aircraft, the defendant further seriously interferes with the use and enjoyment of the previously affected property, the

defendant will then be charged with taking an additional easement for which compensation will be required.

A. J. Hodges Industries, Inc. v. *United States*, 355 F.2d 592 (Ct. Cl. 1966);

Avery v. *United States*, 330 F.2d 640 (Ct. Cl. 1964).

The Court's attention is directed to the statement in *United States* v. *Causby*, 328 U.S. 256, 267 (1946) which provided the basis for the U.S. Supreme Court's remand:

> "The Court of Claims held, . . . that an easement was taken . . . It is not described in terms of frequency of flights, permissible altitude, or type of airplane."

This statement clearly implies the United States Supreme Court's requirement that the easement not only be described but that it be described with precision, even as to the number of flights and the types of planes which are to be allowed under the avigation easement. Accordingly, it must be concluded that the Court recognized that the easement not only can be but must be limited to a definite "frequency of flight" and "type of plane." Thus the City's contention that the easement must be made available to all planes is contra to settled law. By the limited easement, the City is put on notice that if it abuses and violates the Court granted easement by flying additional or different type planes it will be held liable for an additional "taking" for which it would be required to further compensate the plaintiff-appellees.

The present easements therefore must be considered valid and there is no substance to the contention that the District Court's judgment failed to establish the rights and liabilities of all parties involved.

VI.

The Holding Of The Supplemental Hearing On Damages Was Neither Unauthorized Nor An Abuse Of Judicial Discretion.

The defendant City claims that the trial court had no authority to order a supplemental hearing on the issue of damages and that even if such authority existed the exercise of it was an abuse of discretion. Neither contention has any merit.

The period has long passed when the trial of a cause of action was considered as a purely adversary proceeding with the victory belonging to the strongest advocate regardless of the inherent issues of justice involved. Courts now are the seekers of truth and the dispensers of justice and are endowed with inherent powers to achieve those ends. Judge McLean recognized and pursued this. Having found that the facts supported a "taking" of the plaintiffs' property, he turned to the issue of damages and stated "There has been a failure of proof on this subject and I could dismiss the plaintiffs' claims for compensation on that ground. *To do so seems to me unjust.* Accordingly, I will hold a further hearing, limited strictly to this question of amount of compensation . . ." (Op. p. 34) (Italics ours).

This power has been exercised by many courts and has even been extended by Rule 59 of the Federal Rules of Civil Procedure to permit additional evidence even after judgment has been entered. Rule 59(a) allows the court to "open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment". Rule 59(d), titled "On Initiative of Court", further broadens the trial court's powers by stating:

> "Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for which it might have granted a new trial on motion of a party."

Thus under Rule 59 the trial judge, in his own discretion and on his own initiative, has authority to grant a new trial within ten days after the entry of judgment. In the present case the trial judge merely ordered additional evidence on the issue of damages before his final judgment was entered.

That the foregoing rules merely reiterate common law doctrines is evidenced by *Charles* v. *Norfolk & Western Ry. Co.*, 188 F.2d 691 (7th Cir. 1951) *cert. denied*, 342 U.S. 831 (1951) where the court said that Rule 59 recognizes the old common law principles that if a trial judge is not satisfied with a verdict, it is his duty to set it aside and grant a new trial. It is commonplace for courts to grant new trials on the issue of damages alone. In *Wagner* v. *Burlington Industries, Inc.*, 47 F.R.D. 146 (E.D. Tenn. 1969) when the court stated that such power to grant a new trial on the issue of damages is clear, it was merely following precedent established in many other cases. Again, Rule 59(a) recognizes the proposition that a "new trial may be granted . . . on all or part of the issues." This is supported by the case of *Consentino* v. *Royal Netherlands Steamship Company*, 389 F.2d 726, 727 (2d Cir. 1968) *cert. denied*, 393 U.S. 977 (1968), in which the Second Circuit, in a Per Curiam decision, stated:

> "Whether a verdict is excessive and whether a new trial should be granted pursuant to a motion under Rule 59 of the Federal Rules of Civil Procedure are questions addressed to the discretion of the trial judge."

The Respondents contend that the authority of the trial court to hold a supplemental hearing on the sole issue of damages is indisputable.

The City next alleges that even if such authority exists the trial judge abused this discretion in ordering a supplemental hearing when he found no damages had been demonstrated at the original trial.

As indicated above, while the trial judge stated that there was a failure of proof on the subject of damages, he further stated that to "dismiss plaintiffs' claim for compensation on that ground" would be unjust. (Op. p. 34) It is plaintiffs' claim that failure to find a proven amount of damages is quite different from failure to find any proof of damage at all, and that as a matter of record, the Court did find that damages had been proven when it said: "It is reasonable to believe that these properties could be sold for still more if they were not subject to these overflights". The Court then went on to say: "but the evidence does not permit a determination as to how much more the price would be." (Op. p. 34) Basically, what the court did was to find that there was a "taking" and that the plaintiffs had been damaged. It then, after determining the plaintiffs' requested damages as being too high and the City's claim of no damages as untrue, gave to all parties the opportunity to present further evidence to support their respective positions.

The defendant City failed for a second time to support its position. It presented basically the same evidence as it had at the first hearing and the court stated as to the City's claim that none of the plaintiffs had been damaged: "This conclusion defies common sense and I decline to accept it. I have no doubt that the plaintiffs have been damaged." (App. p. 2a)

Having found that the plaintiffs were in fact damaged, it was no abuse of discretion to order further evidence as to

the exact amount of such damage. It was a proper exercise of discretion and may well have saved this court the necessity of remanding the case for a more proper determination of the amount of damages, such as was done in *Decato* v. *Travelers Insurance Company*, 379 F.2d 796 (1st Cir. 1967) and *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965).

It should be noted that on December 11, 1970, almost two months after the trial, the defendant City joined with the airlines in a motion to have Judge McLean reopen the trial to permit further testimony. The petitioners' concern at that time was the effect of the Connecticut state court decision on jet flights. (Footnote, Op. pp. 18, 19) Evidently, the defendant City did not find anything improper about such a procedure when it was the petitioner who sought relief.

Respectfully submitted,

By ANTHONY V. DEMAYO, Esq.

Attorney for Respondents.

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FILED
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MICHAEL RODAK, JR.,

In the

Supreme Court of the United States

JANUARY TERM, 1973

No.

THE CITY OF NEW HAVEN,
Petitioners,
v.
THE TOWN OF EAST HAVEN, ET ALS.,
Respondents.

APPENDIX TO RESPONDENTS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPPLEMENTARY OPINION

McLEAN, D.J.*

In my decision dated July 30, 1971, I stated that unless the parties stipulated to the amount of compensation to be paid by defendant City of New Haven to certain individual plaintiffs for the easement in their properties which I found to have been taken, I would hold a further hearing at which both sides might offer testimony on that subject. No stipulation was forthcoming and accordingly, a further hearing was held on

*Of the Southern District of New York, sitting by designation.

October 18, 1971. Plaintiffs called two real estate appraisers and defendant City of New Haven called one, the same expert who had testified for the City at the trial.

Defendant's expert did not testify to a sufficient number of sales of comparable properties to afford any basis for determining the diminution of market value of the properties in question. Instead, he adhered to the opinion which he had previously expressed at the trial, *i.e.*, that none of the plaintiffs has been damaged because the noise, soot and vibrations emanating from the planes approaching and taking off from the airport have had no adverse effect whatever on the market value of plaintiffs' properties. This conclusion defies common sense and I decline to accept it. I have no doubt that plaintiffs have been damaged. The question is whether plaintiffs have succeeded in proving the amount of that damage with reasonable certainty.

Plaintiffs' experts testified to their opinion as to the market value of the respective properties before the taking and the market value of those properties after the taking, the difference being the damage.* Their opinion as to the market value before the taking was based on data as to sales of comparable properties, except in two instances, in which, there being no comparable sales, the opinion was based on repro-

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* The business property at 52 South End Road, formerly owned by plaintiff Jones, was sold by him on January 2, 1969. Plaintiffs' experts' appraisal for that property speaks as of that date. Their appraisals for all the other properties purport to speak as of September 15, 1971, almost a year after the trial. They testified, however, that their opinion would be the same as of October 1970, the time of the trial. I will treat it as referring to the earlier date.

duction cost less depreciation. Except for one property, plaintiff Munro's residence at 110 Morgan Avenue, defendant does not challenge the accuracy of plaintiffs' figures for the market value before the taking. Defendant's attack on the valuation of 110 Morgan Avenue does not affect the result significantly. The controversy thus relates primarily to plaintiffs' experts opinion as to the market value of the respective properties after the taking.

Plaintiffs' experts testified, in substance, that it was not feasible to determine this value by comparing sales of properties in the vicinity of the airport with sales of similar properties in other neighborhoods because the sales data was inconclusive. The variations in price were too great to permit the drawing of any sound conclusions. They therefore based their opinion primarily upon a formula which has been developed by one Thomas Hall and explained by him in articles in real estate appraisers' trade journals. It is designed to determine the amount of the diminution in the market value of properties adjacent to airports due to airport operations. The formula takes into account three factors: (1) the height of the planes over the subject property up to a maximum of 500 feet; (2) the distance of the property from the extended center line of the runway up to a maximum of 2,000 feet; (3) its distance from the end of the runway up to a maximum of 25,000 feet. Hall ascribed different weights to these factors, giving the greatest weight to the first, the height of the passing planes. Plaintiffs' experts agreed with this weighting in general, but varied somewhat the weight which Hall ascribed to the second and third factors in order to make the formula, in their opinion, more appropriate for this particular airport. Application of this formula yielded a percentage by which the market value of the property before taking should be reduced

in order to arrive at its market value after taking. Since this is done by means of a percentage, it is apparent that in two cases in which the percentages are approximately the same, the dollar amount of the reduction will be larger in the case of a property having a high market value before taking than it will in the case of a property having a low prior market value.

We are dealing here with expert opinion. No opinion is necessarily conclusive. Use of this formula in an airport case, in the absence of any other pertinent data, seems to me to afford a reasonable basis for the experts' opinion. Since I have been given no further pertinent data here, I have decided to apply the formula which, incidentally, produces a result substantially lower than the opinion expressed by plaintiffs' expert at the trial, which I declined to accept. Under all the circumstances, I would not feel justified in rejecting plaintiffs' evidence in its entirety, as defendant suggests.

The service station formerly owned by plaintiff Jones at 52 South End Road, however, is a special case. As to that property, the decision of July 30, 1971 stated (p. 55 n.) that an easement could be granted if Jones could prove "that, because of the overflights, he received less for the property which he sold than he would otherwise have received." Jones has not come forward with that proof. On the contrary, plaintiffs' experts expressed the opinion that the fair market value of the Jones property before the taking was $25,000. This is exactly the figure that Jones sold it for on January 2, 1969. Hence it affirmatively appears that Jones has not been damaged.

Defendant argues that because Jones sold his property in January 1969 for the sum which plaintiffs' experts consider to

have been its fair market value before the taking, therefore the other plaintiffs also could sell their properties for their market value before the taking and hence they have not been damaged either. This does not necessarily follow. Moreover, it may be noted that in January 1969, when Jones sold his service station, neither Eastern nor Allegheny was operating jets, only turbo props. See decision of July 30, 1971, pp. 11-12.

On the basis of all the evidence, I find that the fair market value of the properties of the following plaintiffs has been reduced in the following amounts by the taking:

Michael Fusco	
25 Holmes Street	$2,500
Leslie Munro	
110 Morgan Avenue	2,850
Leslie Munro	
114 Morgan Avenue	2,100
Michael Criscuolo	
72 Morgan Avenue	3,200
Alphonse Guidone, Jr.	
6 Canna Drive	2,250
Louis Audette	
10 Silver Sands Road	2,200
Leon Amendola*	
2 Meadow Place	3,300

* The percentage of diminution is less in Amendola's case than any of the seven plaintiffs, 6.3 per cent as opposed to percentages in other cases running as high as 9.5 per cent. As it happens, however, Amendola's house is more elaborate than any of the others and had a substantially higher market value prior to the taking, hence his damages turn out to be slightly more than those of the other plaintiffs.

These plaintiffs are entitled to judgment against defendant City of New Haven in the foregoing amounts. If any of the parcels is in the joint names of a plaintiff and his wife, the judgment should be in favor of both. I permitted the wives to be joined as plaintiffs for that purpose. See decision of July 30, 1971, pp. 4, 5.

Upon payment of the judgments, defendant City of New Haven will acquire a permanent easement in the properties of these plaintiffs for the operation of a similar number of turbo prop planes and jet planes of the size in use at the time of the trial. See decision of July 30, 1971, p. 56.

Defendant City of New Haven is entitled to judgment dismissing the claim of plaintiff Jones on the merits.

Although judgment has been entered since July 30, 1971 in favor of Eastern Airlines and Allegheny Air Lines, no judgment has as yet been entered with respect to the claims of the various plaintiffs against defendant City of New Haven. As stated at the conclusion of the decision of July 30, 1971, p. 63, defendant City of New Haven is entitled to judgment dismissing all claims except the claims for compensation allowed in this supplementary opinion.

Pursuant to Rule 52(a), this opinion constitutes the court's findings of fact and conclusions of law.

Judgment may be entered accordingly.

So ordered.

Dated: November 1, 1971

EDWARD C. McLEAN
U.S.D.J.

OPINION OF DISTRICT COURT JUDGE WILLIAM H. TIMBERS ON CITY OF NEW HAVEN'S MOTION TO DISMISS

Plaintiff's complaint alleges a taking of their property without compensation by the City of New Haven under color of state law. Such an allegation is sufficient to raise a substantial federal question under the due process clause of the Fourteenth Amendment. *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962); *Mosher* v. *City of Phoenix*, 287 U.S. 29 (1932); *South Covington & C St. Ry.* v. *City of Newport*, 259 U.S. 97 (1922); *Lowe* v. *Manhattan Beach City School District*, 222 F.2d 258 (9 Cir. 1955). *Cf. Mosher* v. *City of Boulder*, 225 F. Supp. 32 (D. Colo. 1964). Since plaintiffs also allege the requisite jurisdictional amount, this Court has jurisdiction pursuant to 28 U.S.C. 1331 (1964).

The City of New Haven, however, claims that this Court lacks jurisdiction because, if the plaintiffs' property has been taken, such a taking is also a violation of Connecticut's constitution and laws, and plaintiffs must, therefore, first seek redress in a state court. This very contention was rejected by the Supreme Court in *Mosher* v. *City of Phoenix, supra.* The plaintiff in that case sought to restrain the City of Phoenix, Arizona, from appropriating her land for purposes of a street improvement project. She alleged in her complaint filed with the District Court for the District Court of Arizona that the city was "attempting to take and appropriate the property of plaintiff without compensation, and to take and appropriate and use same and deprive the said plaintiff of the permanent use thereof without due process of law, or any process of law, . . . and in violation of the rights of plaintiff as guaranteed her

under the Constitution of the United States, and particularly under amendments five and fourteen thereof, which plaintiff here and now pleads and relies on for her protection against the wrongs and threatened wrongs of the defendant city in the proposed taking of her property as hereinbefore described." *Id.* at 31. But because the plaintiff also alleged that the city's action violated state law, the Court of Appeals for the Ninth Circuit affirmed dismissal of the complaint by the District Court for lack of a substantial federal question, noting that the city's action did in fact appear to violate state law. *Mosher* v. *City of Phoenix*, 54 F.2d 777 (9 Cir. 1931). The Supreme Court, however, held that the dismissal was improper:

> "We are of the opinion that the allegations of the bill of complaint that the City acting under color of state authority was violating the asserted private right secured by the Federal Constitution, presented a substantial federal question and that it was error of the District Court to refuse jurisdiction." 287 U.S. at 32.

This case is controlling here. *Barney* v. *New York*, 193 U.S. 430 (1904), cited by the City of New Haven for the contrary position, was decided by the Supreme Court prior to the *Mosher* case. As Mr. Justice Brennan, writing for the Court in *United States* v. *Raines*, 362 U.S. 17, 25-26 (1960), stated:

> "The appellees can draw no support from the expressions in *Barney* v. *City of New York* . . . The authority of those expressions has been 'so restricted by our later decisions', see *Snowden* v. *Hughs* (321 U.S. 1, 13 (1943), that *Barney* must be regarded as having been worn away by the erosion of time, *Tigner* v. *Texas*, 310 U.S. 141, 147, and of contrary authority. See *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 37; *Home Tel. & Tel. Co.*

. *Los Angeles*, 227 U.S. 278, 283-289; *Iowa-Des Moines lat. Bank* v. *Bennett*, 284 U.S. 239, 247; *Snowden* v. *Hughes, supra; Screws* v *United States*, 325 U.S. 91, 107-13, 116. *Cf. United States* v. *Classic*, 313 U.S. 299, 326. t was said of *Barney's* Doctrine in *Home Tel. & Tel. Co.* . *Los Angeles, supra*, at 284, by Justice White: '(its) enorcement . . . would . . . render impossible the performnce of the duty with which the Federal courts are harged under the Constitution'."

Court adheres to the Supreme Court's admonition in a v. *Creasy*, 360 U.S. 219, 224 (1959), that a federal should "stay its hand" in order to avoid "unseemly conetween two sovereignties, the unnecessary impairment te functions, and the premature determination of cononal questions." But unlike *Martin*, the circumstances would merit abstention are not present in the instant . The constitutional question is not a novel one, haveen decided in *Griggs* v. *Allegheny County, supra*, and ctivities from which the plaintiffs seek relief have al- occurred. Furthermore, a state statute is not under atnd the state courts have not, as they did in *Martin*, ed in a related action that relief will be granted.

Court, therefore, finds that plaintiffs state a good cause ion against the City of New Haven over which this has, and should exercise, jurisdiction.

City of New Haven also claims that the plaintiffs' aint must fail because the United States, the C.A.B. ll users and operators of aircraft at the airport are insable parties and have not been joined as defendants. s v. *Allegheny County, supra*, clearly refutes this claim.

A further challenge is made to the maintenance of this suit as a class action and to the standing of certain of the plaintiffs. In view of the fact that the Court has subject matter jurisdiction and the standing of the majority of the plaintiffs is unchallenged, the Court will defer a determination of these issues until a more appropriate point in the proceedings. Similarly, the Court will defer ruling on the issue of whether the City of New Haven is entitled to a further specification of damages, although the Court does find at this time, under the present posture of the action, the complaint alleges damages with sufficient specificity to sustain a cause of action.

The motion to dismiss by the City of New Haven is denied.

ORDER

ORDERED, as follows:

(1) That the motion to dismiss as against the defendant Administrator of the Federal Aviation Agency is granted, but without costs; and the Clerk is directed to enter judgment accordingly.

(2) That the motion to dismiss as against the defendants Eastern and Allegheny is denied.

(3) That the motion to dismiss as against the defendant City of New Haven is denied.

Dated at New Haven, Connecticut, this 31st day of January, 1968.

/s/ WILLIAM H. TIMBERS
Chief Judge

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TESTIMONY OF DONALD J. NITZ

DONALD J. NITZ, called as a witness by the Plaintiffs, being first duly cautioned and sworn by the Clerk, was examined, and testified on his oath as follows:

By the Clerk:

Q. What is your name? A. Donald J. Nitz.

Q. What town do you live in? A. Northford, Connecticut, 56 Coach Drive.

Q. Northford? A. Yes. It is part of North Branford.

Direct examination by Mr. DeMayo:

Q. Mr. Nitz, what is your occupation? A. Real estate appraiser.

Q. Your qualifications appear in each of the specific appraisal reports, do they not? A. Yes, they do.

Q. Would you briefly state your educational background? A. I am a graduate of the University of Connecticut. I have appraised real estate and real estate only since 1966. I hold the R.M. designation from the American Institute of Real Estate Appraisers. I have appeared as an expert witness in Connecticut courts.

Q. Have you testified in Connecticut extensively before boards and commissions and State agencies? A. I wouldn't say extensively, but I have testified, yes.

Q. Have you taken additional courses offered by the Institute of Real Estate Appraisers? A. Yes, I have taken three of the courses offered by the American Institute.

Q. Prior to the embarking upon the effort that resulted in the preparation of these appraisals, had you had any contact with or knowledge of the Tweed-New Haven Airport and the real estate surrounding the airport? A. Yes, I have. My former employer was situated in the City of New Haven, and during my employment with him, I performed a number of appraisals not only in the Town of East Haven but in the Morgan Point area, and in 1966 and 1967 I worked on the original acquisition appraisals for the extension of the runway to its present length.

Q. Upon embarking upon this study, did you return to the area and make field studies and examinations of the subject properties and the area in general? A. Yes, I did. I spent a great deal of time in the Town of East Haven, more time than I intended to. During this time, I investigated the real estate market as thoroughly as I felt anyone could possibly do. I spent a great deal of time in the immediate area, observing the situation as it existed. I talked to a great number of property owners in addition to the property owners of the subject properties as to their feelings and attitudes about the airport and the aircraft and the circumstances which existed right now and also which have existed in the past. I also discussed this matter with a number of people, friends, acquaintances, and people in general who then lived in the East Haven area as to their opinion or their thoughts about purchasing a home in the East Haven area, principally adjacent to or very close to the airport. I put together all of this data and drew my conclusions from it.

Q. Are they basically included in the various appraisal reports which his Honor has received in evidence? A. Yes, they are.

Just to elaborate a bit on one phase of this, were you
e in compiling the market data which went into the
aration of the reports? A. Yes, I was.

Would you describe for his Honor in a general way
t was studied, what areas you covered, what data you
mulated, and how many samplings you took and where
e samplings occurred? A. Yes. As far as the particular
tion is concerned, I considered as my primary areas those
s which were directly at the termination points of each of
runways we are concerned with, and properties
radius around the center point. On the south end of the
ort in the Morgan Point area, because it is an area that
ore or less isolated, it is practically a peninsula and has
r surrounding it on three sides, I considered all of the
erties in that area. When I went up to the northerly end
e same runway, which is a more populated area, I more or
confined myself to the approach zone and the areas sur-
ding that, and on the north of the — I don't know the
bers, but I think it is runway 18, I considered a number
roperties in that area. I also analyzed real estate through-
the Town of East Haven.

. Did you also include in your study real estate or prop-
s in the surrounding towns? A. Yes, I did.

. Do you have a rough estimate as to how many prop-
s were examined other than the subject properties, how
y transactions were involved? A. As I said, I made a
plete study of all the transactions in the area I previously
tioned, and I was to some extent surprised to find the
unt of inactivity in these areas, which is attributed to a
ber of circumstances. I would say my total number of

sales was between 50 and 75. This encompassed an area of which I would estimate there were located possibly 2,000 or 3,000 dwelling units. Of the 50 to 75 sales, about 10 or 15 were of properties which had been zoned and rezoned within the last five-year period.

Q. This was the type of material which you considered and evaluated in preparing these appraisals and in working on this formula? A. Yes, it is. We evaluated the real estate transactions and the real estate market in general and applied it to our formula.

Q. In your professional opinion, do you feel that this formula approach was the preferred, more accurate approach to your problem? A. Yes, I do, the reason being that all of the data I compiled, I felt that the results were inconclusive, the range of variations was great. For instance, properties which had been sold and resold within the last five years within the subject areas, some of them showed evidence of no appreciation; some of them showed evidence of a great deal of appreciation. There was no pattern. I didn't feel there was a sufficient amount of data with this wide variation to establish any conclusions as to effect on the market by an analysis of sales and resales.

Q. Finally, based upon your experience in the field as an appraiser and based upon your activities in this area and your examination and in view of all this, it is your professional opinion that the values stated in the revised Schedule A are consistent with what you personally feel these properties have been damaged?

Mr. FRECHETTE. I would object to that on the ground — if I quoted him correctly — his other results were inconclusive.

The COURT. I know, but I will let him testify.

A. I will have to ask for the question again. I am not quite sure I understand the question.

The COURT. Please read the question.

(Whereupon, the question referred to was read by the Court Reporter.)

A. Yes, I do.

Mr. DEMAYO. I have nothing further.

Cross-examination by Mr. Frechette:

Q. Mr. Nitz, when did you finish working for William Ball? A. March of 1971.

Q. For what period of time had you worked for him? A. Since January 4th of 1966.

Q. Would it be that fact that in Mr. Ball's office he keeps track of all sales in the New Haven area? A. At the present time or —

Q. When you were there. A. I wouldn't — yes.

Q. Does he keep a card file on every sale in the New Haven area? A. It depends on what you call the New Haven area.

Q. From Milford to Guilford to Cheshire? A. No.

Q. Do you keep such a file? A. Not every sale, no.

Q. What does the twenty to one ratio for the Amendola property do to the formula that you have told us about? A. It doesn't do anything to it. You modify it to put the applicable figures in it.

Q. In other words, it is the same as fifty to one? A. No. It creates a steeper angle.

Q. So it would lessen the damage to the Amendola property? A. If applied in the formula, it would depend on other circumstances. If that was the sole change, then it would. If that was the sole consideration, then it would.

Q. Fair enough. Isn't that in the Macon study, that study took into consideration a military base and predominantly retail properties were involved? A. There were some resale properties, but there were also fee-owned properties.

Q. Most of the people in this area were military personnel, were they not? A. I don't believe so.

Q. Are you saying no? A. I am saying I don't believe so. I am not sure.

Q. Do you know? A. I don't know positively.

Q. You know there is a military base there, don't you? A. That's right.

Q. It is the only thing around there? A. I don't know that.

Mr. DeMayo. I object to his arguing with the witness. He has answered the question.

By Mr. Frechette:

Q. Your answer was what? A. I don't know if there were any military people around.

Mr. Frechette. I have nothing further, your Honor.

By the Court:

Q. I don't understand this twenty to one angle for the Amendola property. Can you explain this? A. Yes, your Honor. Perhaps I can show you on a copy of the chart you have in evidence.

Redirect examination by Mr. DeMayo:

Q. This is a copy of one of our other exhibits? A. It is a 50 percent reduction. The Amendola property in relation to the runway which is here would be located somewhere around here. This is a profile of the 5,600-foot runway. This is a profile of the shorter runway, which is the one we are talking about. At the end of this runway as shown in this exhibit, a twenty to one glide angle slope is used, whereas on the 5,600-foot runway where most of the subject properties are located, there is a fifty to one glide angle slope as shown on this diagram (indicating).

The COURT. I don't know what this paper is he was showing me. Is this a copy of an exhibit in evidence?

Mr. DEMAYO. Yes, your Honor. We don't have it available. It is in the Clerk's office, but that is a copy of that exhibit.

The WITNESS. I think you have it right there. This is a reduction. This is why it isn't the same size.

By the Court:

Q. You are referring to the map which was marked at the trial as Eastern Airlines Exhibit A-7? A. Yes, sir, and this is where I was pointing, a twenty to one glide angle, which is

this for this runway because it is utilized by a different type of aircraft.

By Mr. DeMayo:

Q. That was the only property that didn't involve the north-south runway, if you will recall? That is really the eastern end of the east-west runway? A. This was the basis for our utilization of the fifty to one glide slope, your Honor, as shown on this diagram.

Mr. DeMayo. Your Honor will recall that the VASI devices only covered the southern approaches to the north-south runway.

I have nothing else, your Honor.

Mr. Frechette. I have nothing further of this witness.

(Witness excused.)

Mr. DeMayo. The Plaintiffs rest your Honor.

Mr. Frechette. I am going to put Mr. Parente on, if it please the Court.

EXCERPTS OF TESTIMONY OF LESLIE MUNRO

A. Well, the planes start coming in over Gull Rock. That is south of my house.

Q. South out here somewhere? A. That's right.

Mr. DeMayo. I am indicating an area, your Honor, off to the left of the map on the blackboard not shown.

The Witness. It does not come directly over my house. It is on an angle, or — let's see. I am here, and it is up in the

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air here coming over like this. On the way out, when the plane is going out, it goes practically over our house.

Q. You mean when they take off? A. When they take off.

Q. From north to south? A. North to south.

Q. They go over your house? A. Right.

Q. Even when they land? A. They come from Gull Rock.

Q. So that they are lined up closer to the runway when they come in? A. Well, they are 150, 200 feet down the street a little ways.

Q. But, your testimony is that —.

The COURT. Let him testify. Ask him another question.

Q. Now, you live slightly off the center of the extended line of the north-south runway, is that correct? A. That's right.

Q. And is it your testimony that they go out in a straight line? I mean, they go out and go over your house, but when they come in they are not over your house? A. They seem to spot Gull Rock with their lights at night.

Q. Maybe you can step down here and take the pointer and follow them in so I am not coaching you. With your pointer, start at the end of the map and point out to his Honor the course that they take coming in.

The COURT. First, Mr. Munro, would you tell me the approximate distance from your house to the south end of the 2-20 runway?

The WITNESS. It's almost, I would say, three-quarters of a mile from my house to that point there.

The COURT. All right. Now, where is that Gull Rock that you talked about,

The WITNESS. This Gull Rock is out in about here. The breakwater is over here on this side here, and Gull Rock is right here.

Q. All right. Describe the route. A. As it comes in, I would say it goes like this. They bank left to get into the field.

Q. And at that point you claim they are over your house? A. On the way out they are practically over my house, but on the way in they are just to the east of where I am.

Q. You can resume your seat, I think.

How have these flights interfered with your enjoyment of your property? A. Well, the first thing in the morning, they are not exactly on time. They wake you up. You hear a little buzz, and all of a sudden they are right on top of you, and you jump out of bed and just hope it isn't foggy. We are a fog laden airport. You see the airplane coming in, and sometimes their wings are going like this when he is coming in, and you just hope that he is not going to come down and hit you, because I know the result.

Q. All right. What else do you — describe what else you are suffering from with these flights? A. Well, because I am on that angle, the airplane is up in the air like that on account of my house, on an angle, and I was forced to put plexiglass in my windows.

Q. Why was that necessary, Mr. Munro? A. I had over about $200 worth of windows broken in my house due to the flights, and I had to use that, sir.

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Q. You mean you replaced all — A. Everything that breaks, I put in new plexiglass now.

Q. I don't think we need offer that. I think your testimony is sufficient, unless Mr. Murphy or Mr. Beckman wants to question you further. But, do you mean that the planes themselves have broken the glass? A. The vibrations. My house is built on solid rock. I have steel windows, and never thinking that there would be airplanes which would vibrate the windows as much as they do, which in turn breaks the glass. And, it's not the expense of changing them around, but it's the mess. When they come down, we have to dig that glass out. The glass is all over the place, and they have no respect for glass on the bare feet where we can walk out in the summertime.

The COURT. Your house is on the beach?

The WITNESS. Right on the water.

Q. You say windows are broken. Would you observe this immediately after a plane passing? A. We lay in bed, my wife and myself, and we hear a snap, and it starts off with a little crack, and before the end of the day it is right up there, right up the window. Besides that, it is not where the clip goes on the window; it is anywhere on the window. I have eight of them right now to prove it if anybody wants to look at them.

Q. Did you notify the Tweed-New Haven airport of this? A. I believe we called about the airplanes, but we never complained to them about that.

Q. In addition to the breakage of glass, and the sounds that you experience, what other annoyance do you have? What

else have you observed about the flights? A. Well, of course when they are coming in, they head over Gull Rock. If the day is a little foggy, it is unbelievable the soot that comes out of it. My wife is continually wiping it up. Every single day she pulls the dirt off the molding on the baseboard. It seeps through the house. If you open the window after you have not used them for a while, in the curve of the fenestra sashes is all that black soot.

Q. Have you actually observed these planes in flight in an attempt to ascertain where this material comes from? A. Where this what?

Q. Where this soot comes from. Have you actually followed the planes in flight? A. Oh, yes. Of course, the jets — all of them do it a little, but the jets are the worse.

Q. Do you have any other circumstances to describe which you claim are the results of operations at Tweed-New Haven airport? A. I can't think of anything right now.

Q. Well, do you, for example, feel that the jet operations or the plane operations have interfered in any way with the use of the exterior of your house? A. With the exterior?

Q. With the outside of your house. A. Of course we do get the dust on the windows, as I said. It gets right in the grooves. Actually, I have a shadow block house which is plasticrete blocks with thoroseal on it, and it's rough and, of course, naturally it gets all dark, and I have to paint it that much more.

The COURT. How high would you say these planes are when they either go over your house or go near your house?

The WITNESS. Well, as I say, I am laying in bed here, and there are three bars in my window, and when I am laying down flat in my bed, and I just looking out like that, well, I would say probably the plane is five or six hundred feet out.

The COURT. Do you mean above your house?

The WITNESS. No. On the line with these bars, on the second bar of the house, and I can see it on an angle just up there. Well, as I say it's 200 feet away, 300 feet away from my house, and it is coming in, and I look up here like this. If they get below that line, then I know they are darn close. Now, I mean, when you are in a fixed position laying back here, and you can see it on an angle like that, you know darn well they are close.

The COURT. Well, my question was approximately how high above your house, or how high in the air alongside of your house would you say these planes fly?

The WITNESS. They probably will be flying 200 feet. They are all different levels, of course. Sometimes they are a little low.

The COURT. Now, are they sometimes lower than 200 feet?

The WITNESS. I would say yes.

The COURT. Are they sometimes higher than 200 feet?

The WITNESS. Yes.

The COURT. Do you hear any noise from these planes?

The WITNESS. Oh, it's terrific. The noise is just terrific. You just can't answer a telephone. You've got to stop all conversations.

Q. Is it the noise that sets up the vibration that you complain of in connection with your windows? Is that what you meant by vibration? A. I was up in the attic. Of course, there are no windows in my attic on the south side, just on either end. I went up to see how close that plane was coming in, and I put my head up to the glass, and it went s-s-s-s-s-s-t.

Q. If you were to look directly out parallel to — straight out your window, look out on a level with the window pane at a plane going by, how far above your house would they usually appear to be? That is what I think his Honor wants to get at. A. Of course, I can't tell you how far the plane is, but I would say you can tell the difference in the sound which is much closer.

Q. And your best estimate then is 200 feet? A. Well, I would say roughly.

Q. You also indicated that sometimes they are higher, and sometimes they are lower? A. That's right. It depends on the pilot that is coming in.

Q. In your opinion, have the increased operations at the airport made your residence less desirable for you to live in than back in the days when you only had the smaller planes to

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EXCERPTS OF TESTIMONY OF MICHAEL FUSCO

MICHAEL FUSCO, of 25 Holmes Street, New Haven, Connecticut, having been called as a witness, was duly sworn and testified on his oath as follows:

Direct examination by Mr. DeMayo:

Q. Mr. Fusco, your property is located beyond the northern end of the north-south runway, is that correct? A. Yes.

Mr. DEMAYO. I believe counsel are in agreement then that this would be Mr. Fusco's property right here.

Q. And then you are across Dodge Avenue? A. Definitely. Yes, sir.

Q. Is your entire property located in the City of New Haven, Mr. Fusco? A. No. It's not.

Q. A portion of it is in both towns? A. Yes, sir.

Q. Has the City of New Haven ever offered to purchase your property? A. No, sir.

Q. Could you tell me approximately, if you know, how far you are in feet from the airport boundary at Dodge Avenue? A. I'd say about 900 feet.

Q. 900 feet? A. Yes.

Q. And your property, as the map would indicate, is in the direct glide path to the north-south runway, is that correct? A. Yes.

Q. Does that mean that the planes using that runway all come over your house? A. Yes.

Q. Both on take-off and on departure? A. No. Well, it depends which way the wind blows.

Q. I see. If they were taking off south to north, do they go over your property? A. South — from south to north they come over my house, yes.

Q. And if they are taking off north to south, they —. A. They warm up on my side.

The COURT. They warm up what?

The WITNESS. On my side. They warm up. The planes are idling; they sit by Dodge Avenue and they idle, they warm up.

Q. Now, that point where they would be idling then, preparing to take off from north to south, that would be in front of your house? A. Well, in the back of the house, yes.

Q. Your back of your house faces that direction? A. Yes.

Q. Can you hear them when they are on the runway? A. Yes, sir.

Q. And would you describe to us what you hear? A. Well, sometimes they are on there for at least half an hour, and they just idle, just making noise, you know. They are idling, warming up, maybe waiting for clearance, I don't know. But they are still there annoying us, and then the smells come. If they are near any period of time, the smells start coming, and we shut the windows. It gets bad.

Q. Now, does the noise have any affect on conversation in your house? A. Well, only on take-offs it does, but if they are idling there, they are far enough away so that we could still talk.

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Q. You could still talk? A. Unless they take off.

Q. It is when they take off that your conversation is impeded? A. Yes, sir.

Q. And while they are idling and you can hear the noise, is this a loud noise? A. It is a whistling type noise, you know. It is not actually a motor. Well, it is a motor, but I don't know what you are talking about now, a turbo-prop or a jet.

Q. Any plane. A. Yes. On a plane idling their motor, there is a whistling noise.

Q. But it is not — it is greater when they take off than when they are idling? A. Definitely, yes.

Q. The takeoff noise interferes with conversation? A. Yes.

Q. What if anything do you suffer from the idling noises? A. Well, when the noises — usually what it actually does is make the smell come from, you know, from south to north, which is my side. See, the smell eventually gets as far as us, you know.

Q. In other words, the major annoyance and inconvenience you suffer from the idling is the fumes? A. Yes.

Q. Rather than the noise? A. That's right.

Q. But referring to the noise itself, what affect does that have? A. Then what happens then is the fumes and the soot and everything come back to my house, and there are oil spots that are on my house, on the back side of my house.

Q. You have actually found oil spots? A. Oh, definitely. There is no question about it.

Q. And have you actually watched these planes performing this function so that you can follow this? A. Definitely. You could see it from my back window.

Q. From your back window? A. Yes.

Q. Right to the airport? A. Definitely.

Q. And you say that there are times when they idle on the runway for half an hour? A. Yes.

Q. Taking planes which are taking off from the south end of the runway, which would be the farthest—. A. Farthest, yes.

Q. Would they follow a path over your property? A. Yes. Here's what actually they do. When they are taking off, they take off and once they are airborne then they bear left a little bit, you know.

Q. But is there a path approximately over your house? A. Yes. Definitely, yes.

Q. Now, how about planes that are landing on the north-south runway, and are landing north to south. Do they make their approach over your house? A. Over my house.

Q. Now, can you estimate how low they are when they pass your property? A. Well, I'll put it this way. I read one time —.

The COURT. Speak slowly.

Mr. DEMAYO. Slow down.

The WITNESS. I read one time where the poles are about 50 feet, these poles that look like telephone poles with lights

on them, and I'd estimate another five feet, so it's 55 feet. They come right over the poles with the lights on them.

Q. When you say poles, are these poles located in close proximity to your property? A. Yes. They are right about ten feet from my property.

Q. And these are poles with red lights on them? A. Yes, sir.

Q. Were these erected for the benefit of the airport?

Mr. WINER. Objection, your Honor. I think that is leading. We don't know whether he knows it or not.

The COURT. Do you know that?

The WITNESS. Well, I assume so, your Honor.

Mr. DEMAYO. You don't know who erected them?

The WITNESS. Well, I'll tell you we didn't.

Q. You didn't put them up? A. No, sir.

Q. You didn't put the red lights up? A. No, sir.

Q. But there is a row of poles facing the runway with red lights? A. Yes, sir.

Q. And you estimate their height to be 50 feet? A. 50 feet, yes, sir.

Q. And these are 10 feet from your property? A. Ten feet from my property, yes.

Q. And when these planes pass over this row of poles with the red lights, how high off the ground would you say they were? A. Fifty-five feet.

Q. Fifty-five feet off the ground? A. Yes.

The COURT. So they miss the poles by five feet?

The WITNESS. I would say so, your Honor.

Q. At least they come very close to the poles? A. Definitely.

Q. Now, when they are proceeding in this fashion — let's first direct your attention to night arrivals, or after dark arrivals. Would you describe what happens on your property as a plane approaches to land at the north end of the north-south runway? A. Usually watching T.V. at night, we get a big flicker in the T.V. for one thing, and it does make enough noise at times that it wakes my children up when they are sleeping. My youngest is six, so it could wake her up. I am not saying it happens often, but it does happen. They are light sleepers, you know.

Q. What else? A. Our conversations — we have to stop conversations. We can't talk.

Q. Do you observe any odor at this time? A. Well, no. Not really. Not when they just come over, because when they are coming over they just, you know, they cut their power down. It is only when they are — in other words, when they are full power I get all the soot and everything, but not at quarter speed or whatever you want to call it.

Q. Now, are there any other activities of these planes approaching in this direction that annoy you? A. Well, both planes make noise.

EXCERPTS OF TESTIMONY OF ALPHONSE GUIDONE

• • • flights that you are relating to us in February or March of 1967? A. I didn't get that.

Q. What did you first observe? A. What did I first observe?

Q. Yes. A. Well, the turbo-prop, and naturally the larger planes were coming in, and it got quite noisy, and I started to see the fumes, and vibrations, and annoyances.

Q. Now, do these planes pass directly over your house? A. That's correct. The approach to the north-side runway is directly over my house.

Q. So they pass over your house in close proximity? A. There are times when they are directly, and other times where it is just in front of my house going over, and sometimes to the left, either left, or right, or over.

Q. And would you estimate, or do you have an estimate of the altitude of these planes as they pass over your property? A. I would estimate at times — it varies. I would say anywhere from 45 to 100 feet off the ground. I am basing my estimation on the height of our telephone poles outside our house which is 35 feet, as well as our trees, and from my estimation it would be anywhere from 45 to 100 feet.

Q. When these planes pass in that close proximity to your house, what occurs inside? A. Inside my house?

Q. Yes. A. Well, any time they fly over, you definitely get the noise, you get the fumes, you get the vibration, and the fumes.

Q. Now, you get this overflight when they are coming in to land from the south to the north, is that correct? A. And I get it when they take off, if they take off going over, because they take off and come in directly over my house.

Q. So you get the traffic in both directions? A. Take-off and landing, yes.

Q. Now, with respect to the hours these planes keep, could you tell us the hours of maximum inconvenience to you? A. Yes. Well, you get the morning flights. The present situation now on the jet service on the Eastern is that you get that Eastern plane — it is supposed to be coming in shortly after 7:00, but it could be anywhere from 7:00 to 9:00 o'clock in the morning. Now, it depends on the weather conditions whether he is up there circling, waiting for a clearance to land, and while this is happening, naturally you have the constant going around and around. I have had many times experienced this during the day, because I conduct the majority of my business from • • •

• • • may be expanded with the possibility of jet operations, and it is from that time on that I started, sir.

Q. Isn't it true, Mr. Guidone, that you had four engine turbo-prop Electras coming into Tweed-New Haven on a regular basis? A. That's correct.

Q. From April of 1967 on? A. If you say so. I don't know the exact time. I know there was aircraft coming in in February or March of '67. There was Eastern and Allegheny coming in.

Q. But you didn't take notes about those? A. Just observations.

Q. And in fact, as the result of making the observations later that you wrote down, you found out that these planes were operating regularly on a particular localized flight path? A. Flight path?

Q. They stuck pretty much to the same path, didn't they? A. No. No. I would never say the same path. They varied, especially Allegheny. At one time we never knew which way they were coming. As a matter of fact, we had considerable trouble there with Allegheny at one time with their approaches and the way they were circling, coming in.

Q. About how many written notations did you make? A. Oh, a hundred or so.

Q. And most of them, I understand, you threw away, is that right? A. Yes, because it's all repetitious. I mean, it pertains to low flying aircraft, and particular airlines coming in. There were certain things that we suffered, and it is just a question of different dates and different time elements, but it generally consists of the same thing in all cases. So, it is just repetition.

If you want to talk about phone calls, if I called once, I called a dozen times. It would always be the same story.

Q. As to the approaches made by these planes landing at the airport, they were coming in pretty much in your opinion low near your house, but in about the same location when they got on the approach? A. On the landing, that's correct. It was either directly over my home, or to the front, or to the back of my house.

Q. Were they further away from your house when they took off? A. The jet takes off straight up. He comes directly over my house. This is where you get the vibration and the fumes.

Q. But the distance of the plane from your house is greater, is it not? A. The overhead distance taking off is always greater, yes, • • •

EXCERPTS OF TESTIMONY OF ANNA AUDETTE

• • • It should be only her husband.

The COURT. I am going to take her testimony as bearing on the issue of what the conditions are there. There is no claim being made here for any damages on her part, but she is a competent witness to testify as to what the conditions are. The pre-trial order lists among the plaintiffs' witnesses all the plaintiffs and their respective spouses, and this appears to be a respective spouse.

Mr. BECKMAN. Yes, sir. I would respectfully observe, your Honor, that livability is a very subjective reaction, and Mr. DeMayo, is asking for that kind of evidence from Mrs. Audette, which I think has no place in this courtroom.

The COURT. Overruled.

Q. I think I asked you, Mrs. Audette, what actual damage you observed on your property? A. On our property, at this time in 1967, on November 4 an Eastern Airlines' plane came in at about 7:00 o'clock in the morning. It was the one that was due at 6:34. It came in with a typically deafening noise, and the window in our bedroom broke. We were still — well, it was the difference of being asleep and being awake. The second instance —.

Q. Would you continue if you have any others? A. Yes. The second instance was on December 23rd of the same year. At 2:31 in the afternoon another Eastern plane came over,

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and I was seated in my studio, and the skylights of my studio broke.

Q. You refer to your studio. Could you tell us briefly what that consists of, and what type of activity you conduct there? A. Yes. It is a building that is 16 by 36 in size. It has a large skylight on the southern side, and I use this to — well, in my profession as a print maker, which is associated with my teaching at Southern Connecticut State College.

The COURT. What kind of prints do you make?

The WITNESS. Primarily etchings.

Q. Is this a studio that was renovated or improved since you acquired the property? A. It was. It was built since we acquired the property.

Q. Totally built? A. Yes.

Q. And added to the property you purchased then? A. That's correct.

Q. From time to time, since the two episodes that you have related to us, have you made notes as a result of particularly disturbing episodes involving flights in close proximity to your house? A. Yes. I have.

Q. And would you require them to be able to answer any questions as to dates and the occurrences? A. Yes. I would like to be able to use them.

Q. Would you take them chronologically, and excluding anything that could be considered an ordinary occurrence, will you just give us some of the episodes that you feel were unusual in their impact, and you may refer to your notes, but please do not read from them. A. Right. I must say first

that these notes pertain almost, or really entirely to the last month or month and a half, because I was away from our house for the better part of this last summer. So, my first notation occurs on September 2nd of this year, where I noted that a jet went over my studio at 2:50 p.m. It was a warm day, and I had both doors open. The windows do not open readily, so I had the doors open for ventilation. Besides the usual noise, there occurred a terrific downdraft which blew all my drawings about in the studio, and this caused some concern to me, because they are made with graphite, which is a loose substance, and it had not been fixed yet with a fixative, so that this gave me quite some problem.

Q. The next one? A. The next one was the next day on September 3rd, 3:09 p.m. A jet took off over our house with an absolutely deafening noise.

Q. Were you in any position to estimate the height at which they passed over your property, first in approaching the runway to land. Only if you can estimate.

Mr. MURPHY. I think I will object to the form of that question. I don't think she said yet that they do pass over the property.

The COURT. Sustained.

Q. Isn't it a fact, Mrs. Audette, that your house is on a direct line with the north-south runway? A. Yes, sir.

Mr. MURPHY. Objected to as to form, your Honor. It is leading.

The COURT. I'll allow it. The map certainly indicates that to me.

Mr. DeMayo. It indicates it to me, too.

Q. Isn't that a fact? A. Yes. That is true.

Q. And isn't it also a fact that the planes landing on the north-south runway, from south to north, pass either directly, or almost directly over your house? A. That is correct.

Q. Now, with respect to my previous question, are you in a position to estimate the height above your property at which these planes pass? A. I would say roughly, yes. I certainly have watched them many times from outside the house, and I would say that if one were to double the height of the house, one would be not far below one of those planes. So, our house is probably 35 feet high. I would say 40 to 50 feet high.

Q. Above the house? A. Coming in.

Q. Now, how about on departure? A. On departure they are somewhat higher.

Q. Do you still receive the noise that you described when they depart? A. Very definitely.

Q. But is it fair to say that it is less on departure than on arrival? A. No. It is — curiously enough, the height factor does not seem to be directly — I don't think there is all that much difference in the height factor, and the noise is not affected by this difference.

Q. I see. A. I think the quality of the noise makes a lot of difference here, and the quality of the noise on take-off is different from that of landing.

Q. Now, again referring to the memorandum that you have, do you have any other episodes? A. Yes. I do.

Q. Altogether, how many episodes have you noted? A. In the period of time between September 2nd and today, I have ten outstanding episodes.

Q. Well, rather than burden the Court with a recitation of all of them, would you pick out what you feel to be particularly upsetting episodes, and continue chronologically? A. On September 8, a jet passed over our house at 9:50 p.m. and for some reason the windows were caused to rattle rather more than usual.

On October 14, I experienced a phenomena that occurs occasionally, but not regularly, and that is that after the plane has gone over the house, there are certain rather eerie noises that follow it, I guess the result of some air disturbance. They are rather hard to characterize. They are not immediately associated with the plane, but rather with the air disturbances that come shortly thereafter.

All I can say is that they are eerie.

Also, yesterday afternoon — I just happened to recall this with particular clarity — I did not sleep well the night before, and I decided at 4:15 to take a nap, feeling fairly certain that the Eastern plane had left somewhere in the vicinity of 3:00, and that I, therefore, could get some rest. At 4:30 an Eastern plane took off over our house with an absolutely deafening roar, and the nap was terminated.

Q. Do these planes maintain a regular schedule of arrival and departures? A. No, they do not.

Q. Have we now exhausted those episodes which you feel are particularly noteworthy, and worth calling to the atten-

tion of the Court? A. I would say so, yes. The rest just pertain to excessive noise.

Q. Is there any other items of physical damage that you can recall associated with your property? A. Yes. There are two things that happened this year. Unfortunately I cannot give you precise dates for them because they — well, let me explain how they occurred, and I think that will explain why I can't give the precise date. We repaired a wall in our house last winter. The repair was to cover up a crack that existed between an interior wall and an exterior one, that was our western wall. This repair held perfectly well through the spring, during a time of climatic change. Nothing happened. In the middle of the summer, after the advent or the resumption of jet service at the airport, the crack had opened again, and I cannot think of anything else that would have opened up this crack.

Also, on the same wall where the window broke in 1967, another window broke in almost an identical fashion. Again, I would associate that with the jet traffic.

Mr. DeMayo. Thank you, Mrs. Audette. I have nothing further at this time.

Mr. Beckman. I respectfully request — excuse me, your Honor — that the testimony of Mrs. Audette relating to her personal reaction such as being awakened from a nap be stricken as related to her own reaction.

The Court. Denied.

Cross-examination by Mr. Murphy:

Q. Mrs. Audette, you did understand at the time you received that list of aircraft schedules, prior to purchasing the property, that turbo-prop aircraft were operating, did you not? A. Yes. I did. But not four engines ones.

Q. And you were aware, were you not, that the flight • • •